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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*[Protest of VA Purchase of Equipment]*

FILE: B-194757

DATE: April 3, 1980

**MATTER OF:** Lanier Business Products, Inc.

**DIGEST:**

Agency may not justify purchase of other than lowest-priced dictation system from FSS on basis of responsibility factors, since GSA determines responsibility of FSS contractors when annual FSS contracts are awarded.

AGC01049

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CN601046

AGC00017

DLG01387

Lanier Business Products, Inc. (Lanier), protests the award by the Veterans Administration (VA) Hospital, Cincinnati, Ohio, of an order for dictating equipment to the Dictaphone Corporation (Dictaphone) under a Federal Supply Schedule (FSS) contract. Lanier objects to the award because its quotation for the dictation system was less than that submitted by Dictaphone. The protest is sustained.

Federal Property Management Regulation (FPMR) § 101-26.408-2 (1979) requires an agency to justify its decision to pay more than the lowest price available under the FSS. The VA's justification is that the performance of Lanier's local distributor which would install and maintain the dictation system, Donnellon-McCarthy (D-M), performed unacceptably on the maintenance portion of the previous contract. Lanier is the FSS contractor, D-M is its exclusive distributor for the area including the VA hospital. Previous performance is not among the specific justifications listed at FPMR § 101-26.408-3, nor is it similar to them. Those justifications are concerned primarily with the product, not the contractor. VA essentially determined that D-M was nonresponsible.

That determination is not for a user agency to make when placing a purchase order against an FSS contract. The General Services Administration (GSA) determines the

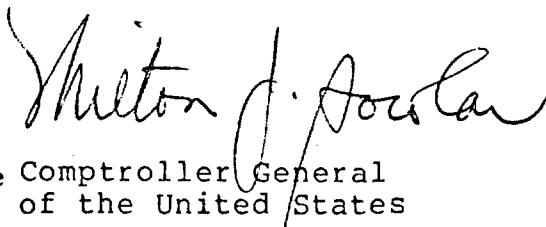
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responsibility of FSS contractors when it awards the annual contracts. See 41 C.F.R. § 5A-73.301 (1979). User agencies must accept those determinations and cannot use responsibility factors to avoid placing a purchase order with the contractor offering the lowest-priced products meeting the user's minimum needs.

If a user agency experiences difficulty with a contractor after awarding a purchase order, the user may declare the contractor in default and purchase elsewhere. FPMR §§ 101-26.403-3 and 101-26.403-4. Under appropriate circumstances, GSA may declare an FSS contractor in default on an overall basis for any or all items covered by the contract. If that should occur, then user agencies may not accept further performance from the contractor nor place further orders with it and must purchase elsewhere. FPMR § 101-26.403-6. When GSA next awards the annual FSS contracts, defaults and other problems may be considered in determining contractor responsibility.

Therefore, if the VA was having problems with D-M's contract performance, as a minimum, the VA should have notified GSA so that GSA could consider them in determining Lanier's responsibility when subsequent annual FSS contracts were awarded. It was improper, however, for the VA to award a purchase order to Dictaphone at a higher price based on D-M's past performance.

The purchase order was awarded in April 1979 and the dictation system was installed in July 1979. Therefore, no corrective action is being recommended at this time. However, by letter of today, the matter is being brought to the attention of the Administrator of Veterans Affairs, to prevent the occurrence of similar deficiencies in the future.



For The Comptroller General  
of the United States